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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Nathan Sterling Mason,
Plaintiff,

v.

Charles L. Ryan, et al.,
Defendants.

No. CV 19-04987-PHX-DGC (MHB)

ORDER

Plaintiff Nathan Sterling Mason, who is currently confined in Arizona State Prison Complex (ASPC)-Lewis, Buckley Unit in Buckeye, Arizona, brought this civil rights action pursuant to 42 U.S.C. § 1983. Before the Court is Plaintiff's "Motion to Dismiss Certain Defendants/Motion to Reconsider Doc. 113." (Doc. 114.)

I. Background

Upon screening Plaintiff's First Amended Complaint (Doc. 19) under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated the following claims: (1) an Eighth Amendment medical care claim against former Arizona Department of Corrections (ADC) Director Charles Ryan in his individual capacity in Count One; (2) an Eighth Amendment official capacity medical care claim in Count One against current ADC Director David Shinn; (3) an Eighth Amendment medical care claim in Count Four against Nurse Practitioner Ende in his individual capacity; (4) First Amendment retaliation claims in Count Three against Special Security Unit Officer Taylor, Lieutenant Randall Lowe, Corrections Officer (CO) III Jaymond Williams, Deputy Warden Ronald Abbl, CO II

1 Evans, CO II Kila, and CO II Vargas; and (5) a First Amendment retaliation claim and an
2 Eighth Amendment excessive force claim against CO II Hernandez in Count Three.
3 (Doc. 28.) The Court ordered these Defendants to answer the respective claims against
4 them and dismissed the remaining claims and Defendants. (*Id.*)

5 On February 5, 2020, service was returned unexecuted for Defendants Vargas and
6 Hernandez. (Docs. 47–48.) The Court ordered Defendants to file the last known addresses
7 of Defendants Hernandez and Vargas under seal, and Defendants responded that they were
8 unable to identify which correctional officers “Hernandez” and “Vargas” Plaintiff was
9 referring to in his complaint because there were many correctional officers employed by
10 the Arizona Department of Corrections with those surnames. (Docs. 96, 102.) Defendants
11 were therefore unable to provide the Court or Plaintiff with the current work locations or
12 last known home addresses of Defendants Vargas and Hernandez. (Doc. 102.) On May 13,
13 2020, the Court dismissed Defendants Vargas and Hernandez for failure to timely serve
14 and failure to prosecute. (Doc. 113.)

15 **II. Plaintiff’s Motion**

16 **A. Voluntary Dismissal of Defendants**

17 In his Motion, Plaintiff states that he moves to voluntarily dismiss Defendants
18 Evans, Kila and Williams from the action. (Doc. 114.) Federal Rule of Civil Procedure
19 41(a)(2) provides that after a defendant has answered the complaint, “an action may be
20 dismissed at the plaintiff’s request only by court order, on terms that the court considers
21 proper.” Fed. R. Civ. P. 41(a)(2). “A district court should grant a motion for voluntary
22 dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain
23 legal prejudice as a result.” *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001). Unless
24 otherwise ordered, dismissal is without prejudice. Fed. R. Civ. P. 41(a)(2). Here,
25 Defendants have not objected to Plaintiff’s request to dismiss Defendants Evans, Kila, and
26 Williams, and they present no argument that prejudice will result if this portion of
27 Plaintiff’s Motion is granted. The Court therefore will grant Plaintiff’s request and dismiss
28 Defendants Evans, Kila, and Williams without prejudice.

1 **B. Reconsideration of May 13, 2020 Order**

2 Plaintiff asks the Court to reconsider its Order dismissing Defendant Hernandez.
3 (Doc. 114.) Plaintiff states that he “received Hernandez’s name less than 1 week prior to
4 the Court’s sua sponte dismissal” and that he “planned to submit the summons on
5 5/14/2020” which would have been his first opportunity to do so after identifying
6 Defendant Hernandez. (*Id.*)

7 In his First Amended Complaint, Plaintiff alleges that he was assaulted by CO G.
8 Hernandez on September 7, 2019. (Doc. 19 at 12.) On May 8, 2020, Defendants filed a
9 supplemental notice indicating that there was a CO Guillermo Hernandez assigned to the
10 Buckley Unit on that day, and Defendants provided the physical address for the Buckley
11 Unit. (Doc. 112.) The Court dismissed Defendant Hernandez just a few days after
12 Defendants filed their supplement notice and before Plaintiff had an opportunity to serve
13 Defendant Hernandez at the address provided by Defendants. The Court finds that
14 reconsideration is warranted and will reinstate Hernandez as a Defendant and give Plaintiff
15 60 days to execute service on Defendant Hernandez. Failure to serve Defendant Hernandez
16 within this time may result in his dismissal from the action.

17 **IT IS ORDERED:**

18 (1) The reference to the Magistrate Judge is withdrawn as to Plaintiff’s “Motion
19 to Dismiss Certain Defendants/Motion to Reconsider Doc. 113” (Doc. 114), and the
20 Motion is **granted**.

21 (2) Defendants Evans, Kila, and Williams are **dismissed without prejudice**
22 pursuant to Federal Rule of Civil Procedure 41(a)(2).

23 (3) The portion of the Court’s May 13, 2020 Order (Doc. 113) in which the Court
24 dismissed Defendant Hernandez is **vacated**.

25 (4) The Clerk of Court must **reinstate** Hernandez as a Defendant and provide
26 Plaintiff with a **service packet** as to Defendant Hernandez.

27 (5) Plaintiff must complete and return the service packet to the Clerk of the Court
28 as to Defendant Hernandez **within twenty-one (21) days** from the date this Order is filed.

Dated this 2nd day of June, 2020.

David G. Campbell
Senior United States District Judge